

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

CHRISTINA GREEN,	:	
	:	
Claimant Below-	:	C.A. No: 04A-09-003 RBY
Appellant,	:	
	:	
v.	:	
	:	
CONAGRA POULTRY, Co.,	:	
	:	
Employer Below-	:	
Appellee.	:	

Submitted: July 27, 2005
Decided: September 8, 2005

Walt F. Schmittinger, Esq., Schmittinger & Rodriguez, P.A., Dover, Delaware,
Attorney for Appellant.

J.R. Julian, Esq., Wilmington, Delaware, Wilmington, Delaware, Attorney for
Appellee.

***Upon Consideration of Appellant's Appeal
from Decision of Industrial Accident Board***

REVERSED AND REMANDED

YOUNG, Judge

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Christina Green, (“Claimant”) appeals a decision of the Industrial Accident Board (“Board”), awarding her workers’ compensation benefits of \$189.33 for disfigurement, and limiting the award of attorney’s fees to \$1.00. This appeal is confined to the Board’s award of limited attorney’s fees.

For the following reasons, the Board’s decision is REVERSED and REMANDED for further consideration.

FACTS

Claimant injured her right knee on March 22, 1994 while working on the production line at Conagra Poultry Co. (“Employer”). This injury caused some scarring on Claimant’s right knee. On May 4, 2004, Claimant filed a Petition to Determine Disfigurement Benefits, seeking to recover for the scars on her right knee.

Controversy by way of correspondence between counsel, played against a backdrop of some history between them, involved production of photographs and ultimate use of photographs. That is pertinent here only because that struggle evidently was an aspect of the Board’s attorney fees consideration.

The Board held a hearing on August 25, 2004. At the hearing, Claimant testified about her injury, which caused three scars on her right knee. The Board examined the scars at the hearing. After the hearing, the Board awarded Claimant one week of workers’ compensation benefits for her disfigurement, totaling \$189.33. The Board also awarded attorney’s fees of \$1.00. The Board determined that:

[S]ince Claimant’s counsel failed to cooperate and provide the photographs to Conagra’s counsel, Conagra was unable to make a settlement offer. Therefore, the Board finds that a minimal

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attorney's fee of \$1.00 is appropriate in this case.¹

Claimant argues, in her limited appeal, that the Board's decision is against settled Delaware precedent and public policy. Claimant asserts, specifically, that the Board's decision contains an error of law, because it failed to consider the appropriate factors for an award of attorney's fees under *General Motors Corp. v. Cox*.²

Employer did not file a response to Claimant's motion, despite a Final Delinquent Brief Notice sent to Conagra's Counsel on May 6, 2005.

STANDARD OF REVIEW

In reviewing an appeal from the Industrial Accident Board, the Superior Court must determine whether the Board's decision is supported by substantial evidence and is free from legal error.³ Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.⁴ The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.⁵ It merely determines whether the evidence is legally adequate to

¹ *Green v. Conagra Poultry Co.*, IAB Hearing No. 1025505 (Sept. 8, 2004).

² 304 A.2d 55 (Del. 1973).

³ *Histed v. E.I. DuPont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993).

⁴ *Oceanport Ind., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994) (citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)).

⁵ *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

support the Board's factual findings.⁶

DISCUSSION

Settled Delaware precedent requires that the Board consider certain factors in making its determination of an award of attorney's fees.⁷ These factors, as enumerated in *General Motors Corp. v. Cox*, are:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- (3) The fees customarily charged in the locality for similar legal services.
- (4) The amount involved and the results obtained.
- (5) The time limitations imposed by the client or by the circumstances.
- (6) The nature and length of the professional relationship with the client.
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
- (8) Whether the fee is fixed or contingent.⁸

The Board's discussion of attorney's fees in the case at bar states, in its entirety:

Having received an award, Claimant is entitled to a reasonable attorney's fee assessed as costs against Conagra in an amount not to exceed thirty percent of the award or ten times the average weekly wage, whichever is smaller. *Del. Code Ann. tit. [sic] 19 § 2320*. The Board is permitted to award less than the

⁶ 29 *Del. C.* §10142(d).

⁷ See *Simmons v. Delaware State Hospital*, 660 A.2d 384, 392 (Del. Super. Ct. 1995); *General Motors Corp. v. Cox*, 304 A.2d 55 (Del. 1973). See also Prof. Cond. R. 1.5(a).

⁸ *Cox*, 304 A.2d at 57.

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maximum fee and consideration of the *Cox* factors does not prevent the Board from granting a nominal or minimal fee in an appropriate case, so long as some fee is awarded. *See Heil v. Nationwide Mutual Ins. Co.*, 371 A.2d 1077, 1078 (Del. 1977); *Ohrt v. Kentmere Home*, Del. Super. Ct., C.A. No. 96A-01-005, Cooch, J., 1996 WL 527213 at *6 (August 9, 1996).

The Board finds that in the case at hand, since Claimant's counsel failed to cooperate and provide the photographs to Conagra's counsel, Conagra was unable to make a settlement offer. Therefore, the Board finds that a minimal attorney's fee award of \$1.00 is appropriate in this case. *Id.* Again, the Board hopes that counsel for both parties find a way to work together in a civil and professional manner in the future.⁹

Claimant argues that it was improper for the Board to base its decision on the fact that Claimant's attorney did not send a photograph of Claimant's injuries to Employer's counsel. Claimant further argues that it was an error of law for the Board to fail to consider all the *Cox* factors.

The Superior Court has had occasion to address the issue of failure to provide a photograph in a number of prior cases. In *DeShields v. Harris*, the Board limited its award of attorney's fees to \$50.00 because Claimant's counsel had not provided photographs of the claimant's disfigurement to opposing counsel.¹⁰ On appeal, the Superior Court held that the Board "improperly considered the Appellant's failure to

⁹ *Green v. Conagra Poultry Co.*, IAB Hearing No. 1025505 (Sept. 8, 2004), at 5.

¹⁰ *DeShields v. Harris Manufacturing Co., Inc.*, 1997 Del. Super. LEXIS 539.

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produce the photograph [showing Claimant's disfigurement]."¹¹ The Superior Court in *DeShields*, relied on an earlier decision in *Allens Foods v. Nesmith*. In *Allens*, the Superior court held that the Board properly limited its considerations to the *Cox* factors, noting that "Claimant's failure to provide a photograph has no effect on Claimant's statutory right to an award of attorney's fees."¹² The Court in *Allens* reasoned that the failure to provide a photograph did not affect the right to an attorney's fee, because the request for a photograph was not accompanied by an offer to settle the claim.¹³ Likewise, in *Martin v. Rent-A-Center*, the Superior Court held that the Board should not have taken into account the claimant's failure to produce photographs, but rather should have considered specifically items in the *Cox* factors.¹⁴

In the present case, the Board mentioned the *Cox* case by name, but did not demonstrate that it had considered any specific *Cox* factors. The Board determined, instead, that Claimant attorney fees would be limited, "since claimant's counsel failed to...provide the photographs of Claimant's disfigurement."

By not specifically addressing any of the *Cox* factors, the Board did not provide a reasoned opinion to the Superior Court for appellate review. "In making an award

¹¹ *Id.* at *9.

¹² *Allens Foods v. Nesmith*, 1997 Del. Super. LEXIS 218, at *7.

¹³ *Id.*

¹⁴ *Martin v. Rent-A-Center*, 1997 Del. Super. LEXIS 532, at *7-8. The Court notes that *Martin*, *Allens*, and *DeShields* were all decided under the now-repealed 19 *Del. C.* § 2127(a). The applicable provisions of § 2127 are now contained at 19 *Del. C.* § 2320. The operative provisions of the statute remain the same.

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of attorney's fees, the Board is required to identify the factors on which it relied, and to 'set forth explicitly the *ratio decidendi* for the amount it decided to award.'"¹⁵ The absence of any reference to any of the *Cox* factors denies the Superior Court an opportunity to review fully the Board's legal reasoning and factual findings. That constitutes an abuse of discretion by the Board.¹⁶

Certainly, given the level of the claimant's award, and given the fourth factor of the above cited "*Cox* analysis," for example, an appropriate amount may well be found to be limited to the minimal or nominal amount indicated in the Board's award. To that effect, no new proceeding is necessarily required. If the Board elects simply to enunciate its basis in relationship to the "*Cox* and progeny" factor considerations, and re-affirm its award, that is entirely sufficient, per *Ohrt*.¹⁷ However, that consideration must be enunciated.

CONCLUSION

Therefore, for the foregoing reasons, the Board's decision is REVERSED and REMANDED with instructions to the Board to apply the *Cox* factors to determine the applicable attorney's fee.

¹⁵ *Ohrt v. Kentmere Home*, 1996 Del. Super. LEXIS 356, at *10 (quoting *Simmons v. Delaware State Hospital*, 660 A.2d 384, 392 (Del. 1995)).

¹⁶ *Friebel v. Nat'l Glass & Metal*, 2004 Del. Super. LEXIS 128, at *18 ("In the event the Board neglects to consider all the [*Cox*] factors . . . it has committed an abuse of discretion."). See also *Willis v. Plastic Materials, Co.*, 2003 Del. Super. LEXIS 9, at *5; *DeShields v. Harris Manufacturing Co., Inc.*, 1997 Del. Super. LEXIS 539, at *9.

¹⁷ See *Ohrt v. Kentmere Home*, 1996 Del. Super. LEXIS 356.

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SO ORDERED.

JUDGE

oc: Prothonotary
All Parties
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